

**COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE**

PARAGON RESIDENTIAL
PROPERTIES, LLC,

Appellant

v.

BROOKLINE ZONING
BOARD OF APPEALS,

Appellee

No. 04-16

**RULING ON MOTION TO REQUIRE
FULL COMMITTEE TO HEAR EVIDENCE**

This is an appeal pursuant to G.L. c. 40B, § 22, and 760 CMR 30.00 and 31.00, brought by Paragon Residential Properties of a decision of Appellee Brookline Zoning Board of Appeals granting a comprehensive permit with conditions with respect to property in Brookline, Massachusetts. The Board has moved and requested that the members of the Housing Appeals Committee attend the evidentiary hearing in this matter, to observe and hear the oral testimony of the witnesses in this matter.

In support of its motion, the Board argues that the credibility of the parties' respective witnesses will directly determine the outcome of the hearing and that 760 CMR 30.09(5)(b) prohibits a presiding officer from making "outcome determinative" decisions. It also argues that the Committee members must hear the witnesses' testimony to evaluate their credibility. Paragon opposes the motion on the grounds that the presiding officer's hearing of witness testimony does not constitute a decision that would determine the outcome of the proceeding, that the Committee members are not bound by the recommendations of the presiding officer, and that the Board's position would nullify the long-standing regulations of the Committee

providing for designation of a hearing officer to hear evidence. The regulation at issue, 760 CMR 30.09(5)(b), provides:

Presiding Officer. The Chairman of the Committee shall determine whether a member of the Committee or a hearing officer shall preside at a hearing and such person shall be designated the presiding officer.... The presiding officer shall conduct the hearings pursuant to M.G.L. c. 30A and 760 CMR 30.00 and ... 31.00. The presiding officer shall have all those powers conferred upon the Committee for the conduct of a hearing, except that he or she shall not be empowered to make any decisions which would finally determine the proceedings except on motions to dismiss on grounds relating to jurisdiction, statutory *minima* or presumptions...; on motions to dismiss for failure to prosecute the appeal or comply with an order of the presiding officer or of the Committee, with regard to the enforcement of decisions of the Committee, or where such a determination results from agreement or stipulation between the parties. In cases in which the presiding officer is not a member of the Committee, he or she shall participate in deliberations of the Committee, but shall not vote.

This provision and other portions of § 30.09(5) set out a specific procedure for the conduct of hearings and the preparation and issuance of final decisions. They were written to be consistent with G.L. c. 30A, § 11(7), which requires either that a majority of officials rendering a decision in an adjudicatory proceeding hear or read the evidence, or that the parties be given an opportunity to request a proposed decision to comment upon. The Committee's regulations permit the Chairman to appoint a hearing officer who is not a member of the Committee to conduct the hearing and submit a report of proposed findings of fact and recommended disposition of the appeal to the Committee. 760 CMR 31.09(5)(a), (5)(b) and (5)(i). In accordance with § 30.09(5)(b), the presiding officer participates in the Committee's deliberations, whether or not he or she is a voting member of the Committee. Consistent with c. 30A, § 11(7), the Committee's regulations provide for the issuance of a proposed decision upon a party's request. 760 CMR 30.09(5)(h).¹

As the person observing the witnesses' testimony, the presiding officer makes determinations regarding the credibility and weight to be given to any conflicting evidence.

1. 760 CMR 30.09(5)(h) states:

(h) Review of Record by the Committee. The Committee shall render a written decision based upon a majority vote. If a majority of the Committee have neither heard nor read the evidence, the Committee shall comply with M.G.L. c. 30A, § 11(7). The Committee shall not be required to issue a proposed decision unless a party so requests in writing prior to termination of the hearing....

See *Morris v. Board of Registration in Medicine*, 405 Mass. 103, 110-11, 539 N.E. 2d 50 (1989); *Salem v. Massachusetts Commission Against Discrimination*, 404 Mass. 170, 175 534 N.E. 2d 384 (1989). A presiding officer who is not a member of the Committee also submits a report to the Committee. The role of the presiding officer in conducting the evidentiary hearing and participating in the Committee's deliberations satisfies the requirements of Chapter 30A as well as the Supreme Judicial Court's requirement that the person evaluating the credibility of a witness observe and hear the evidence to evaluate his or her demeanor.² See *Maynard v. Housing Appeals Committee*, 370 Mass. 64, 66, 345 N.E. 2d 382 (1976) (upholding Committee decision in which three Committee members voted for decision, but one Committee member had attended all hearings, another had reviewed all evidence and a third had only reviewed some evidence). Also see *Bayer Corporation v. Commission of Revenue*, 436 Mass. 302, 309, 763 N.E. 2d 1100 (2002) (hearing officer must materially participate in deciding body's deliberations where resolution of essential conflicting factual claims depends upon credibility determinations), citing *Maynard* and other cases. Cf. *Morris, supra* at 110-11 (hearing officer's subsidiary findings of fact based on a resolution of credibility issues must be given substantial deference), citing *Vinal v. Contributory Retirement Appeal Bd.*, 13 Mass. App. Ct. 85, 99-102, 430 N.E. 2d 440 (1982).

The Board's argument that 760 CMR 30.09(5)(b) encompasses credibility determinations among those "decisions which would finally determine the outcome of proceedings" misconstrues the Committee's regulations. Section 30.09(5)(b) is not intended to bar a presiding officer from evaluating witness credibility. Rather, it is intended to prohibit the presiding officer from acting alone in issuing final decisions in proceedings before the Committee, except in the enumerated circumstances cited above. To follow the Board's interpretation would eliminate the possibility of hearing officers presiding over evidentiary proceedings in most, if not all, of the Committee's appeals. The Board's request to require the full Committee to attend and hear the oral evidence in this case presents an extreme burden on the volunteer members of the Committee. Assessments of the relative credibility and weight of witness testimony can be effectively made by the presiding officer, and receive further

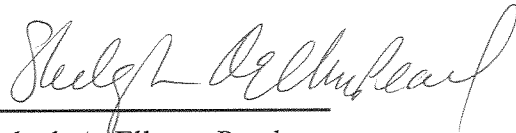
2. The cases cited by the Board, *Covell v. Department of Social Services*, 439 Mass. 766, 787, 791 N.E. 2d 877 (2003); *Bayer Corporation v. Commission of Revenue*, 436 Mass. 302, 308, 763 N.E. 2d 1100 (2002); *Salem v. Massachusetts Commission Against Discrimination*, 404 Mass. 170, 175 534 N.E. 2d 384 (1989), do not require otherwise.

consideration by the full Committee since the presiding officer participates in its deliberations. In any event, because of the technical nature of much of the expert testimony, and with the use of prefiled written testimony, reliance on traditional visual and auditory assessment of demeanor and credibility declines in importance. Although the credibility of witnesses may sometimes be in issue in the Committee's proceedings, for the most part the emphasis is on evaluation of the depth of the witnesses' expertise and whether their opinions have support in underlying facts and analysis.

The parties have the right to request that a formal proposed decision be issued. If they so request, their comments on the proposed decision are supplied to the Committee for its consideration. 760 CMR 30.09(5)(h) and (5)(i). The requirements of G. L. c. 30A, § 11(7) are satisfied. The Board's motion to require the full Committee to hear the evidence is denied.

Housing Appeals Committee

Date: March 2, 2006

A handwritten signature in cursive script, reading "Shelagh A. Ellman-Pearl", written over a horizontal line.

Shelagh A. Ellman-Pearl
Presiding Officer